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Committee on the Elimination of Discrimination against Women

Communication No. 60/2013

Views adopted by the Committee at its sixty-third session (15 February-4 March 2016)

Submitted by:	Svetlana Medvedeva (represented by counsel, Dmitri Bartenev)
Alleged victim:	The author
State party:	Russian Federation
Date of communication:	5 May 2013
References:	Transmitted to the State party on 15 August 2013 (not issued in document form)
Date of adoption of decision:	25 February 2016

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Annex

Views of the Committee on the Elimination of Discrimination against Women under article 7 (3) of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (sixty-third session)

concerning

Communication No. 60/2013*

Submitted by:	Svetlana Medvedeva (represented by counsel, Dmitri Bartenev)
Alleged victim:	The author
State party:	Russian Federation
Date of communication:	5 May 2013

The Committee on the Elimination of Discrimination against Women, established under article 17 of the Convention on the Elimination of All Forms of Discrimination against Women,

Meeting on 25 February 2016,

Adopts the following:

Views under article 7 (3) of the Optional Protocol

1.1 The author of the communication is Svetlana Medvedeva, a Russian national born on 20 March 1986. She claims to be a victim of violations of her rights by the Russian Federation under articles 1, 2 (c), (d), (e) and (f) and 11 (1) (b), (c) and (f) of the Convention on the Elimination of All Forms of Discrimination against Women. The author is represented by counsel, Dmitri Bartenev. The State party ratified the Convention and the Optional Protocol thereto on 23 January 1981 and 28 July 2004, respectively.

1.2 On 23 October 2013, the State party requested the Committee to examine the admissibility of the communication separately from its merits. On 14 March 2014, the Committee, acting through the Working Group on Communications under the Optional Protocol, decided, pursuant to rule 66 of its rules of procedure, to examine the admissibility of the communication together with its merits.

* The following members of the Committee took part in the consideration of the present communication: Ayse Feride Acar, Gladys Acosta Vargas, Bakhita Al-Dosari, Nicole Ameline, Magalys Arocha Dominguez, Barbara Bailey, Niklas Bruun, Louiza Chalal, Naéla Gabr, Hilary Gbedemah, Yoko Hayashi, Ismat Jahan, Dalia Leinarte, Lia Nadaraia, Theodora Nwankwo, Pramila Patten, Silvia Pimentel, Biancamaria Pomeranzi and Xiaoqiao Zou.

Facts as submitted by the author

2.1 The author lives in the Samara region of the Russian Federation. In 2005, she graduated from the Samara River Navigation College, having studied inland waterway and coastal navigation and qualifying as a navigation officer (navigator with a college diploma). On 1 June 2012, she applied for a position of helmsperson-motorist at the Samara River Passenger Enterprise, a limited liability company. Her application was initially approved by the company's deputy director. On 29 June, however, her application was rejected, with reference to government Regulation No. 162 of 25 February 2000, which established a list of arduous jobs and jobs with harmful or dangerous working conditions forbidden to women. The regulation was issued on the basis of article 253 of the Labour Code of the Russian Federation.

2.2 In accordance with section 404 of chapter XXXIII of Regulation No. 162, it is prohibited to use women's labour to fill the positions of machinery crew of all types of vessels and positions combining deck and machinery duties. The positions include that of helmsperson-motorist. In accordance with paragraph 1 of the section, however, an employer may decide to use women's labour for the prohibited positions if safe working conditions have been organized and certified through an assessment of the site.

2.3 Such an assessment, conducted in 2010, found that the position of helmsperson-motorist was not in compliance with the safe working environment requirements because the noise parameters exceeded safe levels. The working conditions were classified as harmful pursuant to the "manual on hygienic assessment of working environment and labour process factors; labour condition classification criteria" (Regulation No. 2.2.2006-05, approved by the Chief State Sanitary Physician on 29 July 2005). The regulation contains no specific explanation to why an increased level of noise might have a harmful impact on women's health.

2.4 The author challenged the rejection of her application in court, seeking a judicial order to compel the company to establish the safe working conditions required for her employment. She relied on the equality provisions in the Constitution and the Labour Code, noting that the latter specifically provided for equal treatment of men and women and prohibited gender discrimination in labour relations (art. 3). On 20 August 2012, the Samarskiy District Court dismissed the author's case, holding that the contested decision did not violate the author's right to employment because it was intended to protect the author from harmful labour factors that had an injurious effect on women and their reproductive health. The District Court relied on the position of the Constitutional Court (decision No. 617-O-O of 22 March 2012) in a case concerning a prohibition on women becoming assistant subway train operators.[1]

2.5 The District Court took note of the company's decision to commission an extraordinary assessment of the workplace conditions. On 28 June 2012, the company had hired an agency to assess the conditions following the replacement of the vessel's engines. At the time of the hearing, however, the results of the assessment were not available and the Court held that the author had an opportunity to reapply for the position if the assessment by the State Sanitary Inspectorate produced a positive certification.

[1] Constitutional Court decision No. 617-O-O of 22 March 2012.

2.6 The author appealed against the judgement, arguing that the District Court had failed to properly examine her primary request, which was to compel the company to create safe working conditions to enable her, as a woman, to work as a helmsperson-motorist. She also argued that the contested decision demonstrated that she was de facto prohibited from exercising her right to employment in accordance with her education because her qualification as a navigation officer would in any case automatically entail work in conditions deemed hazardous for women by law and regulations. It was therefore the duty of the company to create such conditions if practically feasible. The Court, however, had failed to examine whether the company had taken positive steps in that regard and also whether the extraordinary assessment of the workplace conditions had been commissioned for that purpose.

2.7 In its submission for the hearing on appeal, the company indicated that the extraordinary assessment had confirmed that the helmsperson-motorist workplace was classified as having harmful working conditions. The author's appeal was dismissed by the Samara Region Court on 19 November 2012. The author maintained that, with that dismissal, the effective remedies available to her had been exhausted.

2.8 The author pursued an extraordinary remedy and lodged an appeal in cassation before the Presidium of the Samara Region Court. The appeal was dismissed by a decision of 7 March 2013. The justice of the Court held, in particular, that:

> The applicant's arguments that the [first-instance] court, when dismissing her claim, failed to consider her request for placing an obligation on the defendant of creating working conditions required for her employment, despite the fact that the correspondent duty of an employer is provided for in law, cannot be taken into consideration. The first instance court correctly held that conclusion of a labour contract with a concrete person is the right and not the obligation of the employer. In order to help with the realization of this right by virtue of note No. 1 to the list [of the Regulation No. 162], the employer is given the right to take a decision of using women's labour for the prohibited jobs and positions subject to creating safe working conditions which has been confirmed by the workplace assessment. However, these provisions do not vest an employer with an obligation to create such working conditions in every case when a woman seeks employment for the respective post.

2.9 The author also indicated that no complaint had been submitted on her behalf to any other international procedure of investigation or settlement concerning the incidents giving rise to the present communication.

Complaint

3.1 The author claims to be a victim of a violation of her rights under articles 1, 2 (c), (d), (e) and (f) and 11 (1) (b), (c) and (f) of the Convention.

3.2 The author maintains that she has been denied employment by the company because of her sex, on the basis of an explicit legal prohibition. She submits that such difference in treatment is discriminatory and in violation of the Convention and that neither article 253 of the Labour Code nor Regulation No. 162 explains the rationale for the blanket prohibition. In accordance with the reasoning of the Constitutional Court in its decision of 22 March 2012, the prohibition is aimed at protecting the reproductive health of women. However, the prohibition applies to all

women, regardless of their age, marital status, ability or desire to have children or other individual circumstances. She also submits that in her case the judicial authorities erred in interpreting article 4 (2) of the Convention to mean that such a protective measure was justified by that article. It is evident from the wording of article 4 that it was included in the Convention for the purpose of requiring States to enable women to achieve de facto or substantive equality with men, bearing in mind that non-identical treatment of women and men is sometimes required owing to their biological differences. The provision does not sanction the restriction of women's rights, including to work, on the basis of biological differences or their potential to become pregnant and bear children. Article 4 (2) does not justify the limitation or restriction of women's human rights, including to work, nor does it provide a basis for distinctions on the basis of sex that restrict or nullify women's equal enjoyment of those rights.

3.3 The author maintains that, even if the adoption of such a regime resulted from a desire to "protect" women, the foregoing is not relevant to considerations of whether it constitutes discrimination. She indicates that the Convention requires States parties to ensure that employers take measures to remove negative impacts on women's health. Even where such measures do not exist or are impossible, preventing women's employment through exclusionary laws that apply only to women is not appropriate. Occupational health and safety legislation and laws should place obligations on employers to make workplaces safe for all employees of both sexes and should closely regulate inherently harmful or dangerous working environments with a view to protecting the health of all employees of both sexes to the greatest extent possible. Article 253 of the Labour Code and relevant regulations, which simply exclude women from employment in certain fields or working environments, remove the onus from employers to create safe working environments and improve workplace conditions and as such are not an effective mechanism for improving occupational health and safety. In addition, the breadth and terms of the exclusion and its application only to women immediately undermine any claim that it might have a legitimate occupational health and safety function. Rather, those factors indicate that the law was the result of a range of problematic gendered stereotypes and norms.

3.4 The author also submits that article 11 (1) (f) of the Convention, which requires States parties to take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure the right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction, does not justify the blanket exclusion of women from certain professions or jobs. Indeed, it pertains to the right of a woman to protection of health and to safety in working conditions and not to the right of the State to protect the reproductive function of a woman by excluding her and all other women from certain workplaces or jobs regardless of their wish to benefit from such protection. Article 11 (1) (f), which must be read in the context of the other provisions of article 11, obliges States parties to ensure that workplaces and employers take the proactive inclusive measures necessary to protect women's health at work, including reproductive health, thereby enabling them to enjoy the rights to work and health on a basis of equality and non-discrimination. It does not provide a basis for legal exclusions based on sex to be drawn between men and women in terms of who may and may not perform certain types of jobs. Furthermore, article 11 (1) (d) provides that States parties are to take all appropriate

measures to eliminate discrimination against women in the field of employment in order to ensure the right to equal treatment in respect of work of equal value.

3.5 The author further submits that the national authorities cited health and safety grounds in justifying the prohibition of women's employment in certain fields. It is not disputed that certain working environments may potentially have a negative impact on a woman's reproductive health, but no prohibition on harmful employment is provided for in Russian law for men. As pointed out by the Constitutional Court in its decision of 22 March 2012, a sanitary regulation of 28 October 1996 specifying "hygienic requirements for women's working conditions" provided the "objective criteria" for the restrictions on women's labour. At the same time, a similar regulation does not exist to define men's working conditions, although it has been officially recognized that certain professional factors may have a negative impact on men's health, including their reproductive functioning. The author therefore claims that the State party has been inconsistent in applying legal regulations in that field by imposing a prohibition on women only. That demonstrates gender bias and stereotyping rooted in national legislation, which provides for protective measures on the presumption that a woman should always be regarded in the first place as a mother and only thereafter as an employee. Moreover, it follows from the national judicial decisions that the "equivalent level of noise during the working shift exceeding the permitted level" was cited as the justification for preventing the author from working as a helmsperson-motorist. Although it is for the national authorities to determine which occupational factors have an adverse impact on women's health, it cannot be disregarded that there is no scientific proof of immediate or irreversible danger to the author's reproductive health from the increased level of noise. The regulations do not explain how an increased level of noise may negatively influence women's reproductive or general health and whether such influence could not be mitigated by precautionary measures.

3.6 The author claims that the disproportionate nature of the legal prohibition on women's access to certain jobs is evident in her case. She states that she has two children and thus, in accordance with the federal law on the fundamentals of health care in the State party, is entitled to seek medical sterilization on the basis of her desire only. Thus, the law allows her to irreversibly stop her reproductive capacity through sterilization, but at the same time disregards her desire to gain access to employment that is potentially (and theoretically) harmful to her reproductive function and still has no irreversible impact on it. The author refers to the views of the Committee, saying that it has criticized national legal frameworks providing for "blatant inequalities" that can be observed in "women's recruitment, wages and leave entitlements, as well as in legal restrictions on women's, but not men's, employment, which reflected stereotypical attitudes regarding appropriate work for women".[2] The author also refers to a study commissioned by the United Nations Development Fund for Women in 2006, which concluded that, "in non-compliance with CEDAW, six of the nine countries examined restrict women's employment choices by banning them from night work, working in mines ... Such protectionist provisions interfere with women's autonomy and place unreasonable restrictions on their right to choose professions and employment".

[2] See the Committee's concluding observations on Morocco (A/52/38/Rev.1, part one, para. 65). See also those on Algeria (CEDAW/C/DZA/CO/3-4, paras. 38-39) and Croatia (A/53/38/Rev.1, part one, para. 103).

3.7 The author submits that it is clear from the provisions of article 2 of the Convention, read together with article 11, that the Convention requires States to adopt the legislative measures necessary to protect women against sex-based discrimination by employers. Pursuant to article 11, that includes requiring employers to take proactive, reasonable steps to make workplaces safe for women. Accordingly, Russian law should have required the company to make the reasonable adjustments in the working environment necessary to enable women to carry out the desired functions safely, for example by reducing the noise level or the duration of exposure of female employees to harmful noises. Instead, the law provides that the company has the ultimate discretion to decide whether it wishes to make such adjustments. No national law requires an employer to assess what potential adjustments are necessary to protect women's health and enable their participation in the relevant "prohibited" professions and to that end take reasonable and practical measures.

3.8 The author notes that the national courts referred to the fact that the equivalent level of noise during the working shift exceeded the permitted level as the basis for justifying the refusal to employ her as a helmsperson-motorist. It follows that the national authorities have never considered any measures that the company could have reasonably taken to reduce the negative impact of the noise on her health. The author submits that limiting anti-discrimination provisions to negative measures only would render the Convention guarantees merely theoretical, given that it is essential to take "all appropriate measures", pursuant to article 2 (e) of the Convention, to eliminate discrimination against women. It is clear from the terms of articles 11 (1) (b), (c) and (f) that appropriate measures involve positive obligations of States parties to regulate employers and ensure that they take proactive practical measures. The author maintains that the State party should have required the company to take at least practical and reasonable measures on the basis of a comprehensive assessment with the purpose of enabling a woman applicant to take the desired position.

3.9 The author also maintains that article 2 (e) of the Convention requires States parties to take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise. Moreover, the Committee has reiterated in its jurisprudence and general recommendations that under the Convention States parties have the obligation to establish a system of legal protection against abuses by private actors.[3]

State party's observations

4.1 On 23 October 2013, the State party confirmed that the author had applied for the position of helmsperson-motorist at the Samara River Passenger Enterprise, but her application had been rejected because the labour conditions were considered hazardous. It noted that article 253 of the Labour Code limited the use of women's labour in hard, dangerous and/or unhealthy professions, as well as underground

[3] See the Committee's general recommendation No. 19 (1992) on violence against women, para. 9; general recommendation No. 28 (2010) on the core obligations of States parties under article 2 of the Convention, paras. 13 and 19; and communications No. 17/2008, *Pimentel v. Brazil*, views adopted on 25 July 2011, para. 7.5; No. 18/2008, *Vertido v. the Philippines*, views adopted on 16 July 2010, para. 8.4; No. 5/2005, *Goekce v. Austria*, views adopted on 6 August 2007, para. 12.1.4; and No. 6/2005, *Yildirim v. Austria*, views adopted on 6 August 2007, paras. 12.1.2 and 12.1.5.

work, excluding non-physical work or sanitary and domestic services. The list of industries, professions and jobs with unhealthy and/or dangerous working conditions with restricted female labour, as well as maximum permissible weights for manual lifting and handling by females, was approved through a procedure established by the Government, taking into account the opinion of the Russian Trilateral Committee on Social and Labour Relations. At the time of submission, the issue was regulated by Regulation No. 162 of 25 February 2000. Section 404 of the above-mentioned list contained positions in the mechanical crews of all types of vessel, as well as crew members for all types of fleet.

4.2 The State party submitted that the courts had rejected the author's claims regarding the conclusion of an employment contract with her. In accordance with article 3 of the Labour Code, distinctions, exceptions, preferences and limitation of employees' rights determined by the requirements inherent in a specific kind of work as determined by federal law or caused by the special attention of the State to persons requiring increased social and legal protection were not to be deemed discrimination. As stated in decision No. 617-O-O of the Constitutional Court of 22 March 2012, by proclaiming the right of everyone to safety and health, the Constitution reflected the principle that the health of the individual constituted an inalienable benefit of the highest order, without which many other benefits and values would lose their meaning and, therefore, its protection and improvement had a central role in the society and the State. The foregoing determined the obligations of the State, which took responsibility for the protection and improvement of people's health. Accordingly, to implement constitutional rights, the legislation regulating labour relations required the establishment of general provisions, protecting the health of workers, and of specialized regulations, taking into consideration, among other things, the character and conditions of the labour and the psychophysiological characteristics of workers. The foregoing included the specifics of the regulation of women's work.

4.3 The State party indicated that the psychophysiological characteristics of workers were taken into consideration when establishing particular limitations on the use of women's labour; such limitations were introduced in relation to the need for them to be specially protected from harmful production factors that had a negative influence on the female body, in particular on its reproductive function. In establishing a list of arduous jobs and jobs with harmful or dangerous working conditions forbidden to women, the Government had acted on the basis of an assessment of the working conditions and the level of influence of those conditions on the body of the working woman and its reproductive function. The list had therefore been drawn up on the basis of objective criteria, which excluded the arbitrary limitation of the use of women's labour for the listed positions and constituted a guarantee of their right to fair working conditions. At the same time, section 404 (1) of the list established that women could be employed in the listed positions if the employer created safe working conditions; the latter must be confirmed through a site assessment and by a positive assessment of the State labour and sanitary inspectorates. Accordingly, the prohibition on women being employed in the listed positions was not absolute, but was limited until the factors harmful to their bodies were removed.

4.4 The State party indicated that the above legislative provisions could not be viewed as discriminatory towards women because they did not limit the right of

women to work in appropriate conditions and contained guarantees to safeguard women's health at work.

4.5 In the light of the foregoing, the State party considered that the communication was inadmissible.

Author's comments on the State party's observations

5. On 5 January 2014, the author submitted that the State party had merely repeated the position of the national courts and addressed none of the arguments raised in her communication with regard to the discrimination that she had suffered.

State party's additional observations

6.1 On 26 February 2014, the State party reiterated its previous submission. It also submitted that under the international treaties the adoption of special measures to protect motherhood was not considered discriminatory (art. 4 (2) of the Convention). The State party referred to article 10 (3) of the Declaration on the Elimination of Discrimination against Women, stating that measures taken to protect women in certain types of work, for reasons inherent in their physical nature, shall not be regarded as discriminatory, and to article 1 (2) of the Discrimination (Employment and Occupation) Convention, 1958 (No. 111), of the International Labour Organization, stating that any distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof shall not be deemed to be discrimination. The above provisions were reflected in the position of the Constitutional Court in a similar case (No. 617-O-O, decision of 22 March 2012). The Court had stated that the realization of the legal principle of equality could not be implemented without taking into consideration the social role of women in procreation, which obliged the State to establish additional guarantees for women, including in labour relations, directed towards the protection of motherhood. The State party referred to article 253 of the Labour Code and submitted that, according to the Constitutional Court, the article was aimed at protecting women's reproductive health from harmful production factors. It further reiterated that section 404 (1) of the list established that an employer might decide to use women's labour for the prohibited positions, provided that safe working conditions had been organized and certified through a site assessment. Accordingly, the prohibition on women being employed in the listed positions was not absolute.

6.2 The State party also submitted that, under articles 376 (3) and 377 of the Civil Procedure Code, the author could have filed an appeal in cassation against the judgement of the Samara District Court of 20 August 2012 and the decision of the Samara Region Court of 19 November 2012 before the Supreme Court within six months from their entry into force. In addition, article 391 (1) of the Code foresaw the possibility of appealing against the decision dismissing her appeal in cassation to the Presidium of the Samara Region Court (of 7 March 2013) before the Judicial Board on Civil Cases of the Supreme Court (request for a supervisory review). At the time of the submission of the communication to the Committee (14 May 2013), the six-month period for appealing under article 376 of the Code had not expired, but the author had failed to file such an appeal. Furthermore, under article 112 of the Code, there was a possibility to request the reinstatement of the period if the Court recognized that the deadline had been missed for cogent reasons. Accordingly, the author still had the opportunity to appeal. The State party

maintained that the communication was inadmissible under article 4 (2) of the Optional Protocol.

6.3 The State party further submitted that the author could apply for the position of helmsperson-motorist at the company only on a temporary basis, as a replacement for a worker who was on leave and for whom the position was reserved. The leave of that worker had finished by the time the first-instance court had reviewed the author's appeal.

Author's comments

7.1 On 2 June 2014, the author submitted that an appeal in cassation to the Supreme Court was not an effective remedy available to her. In accordance with article 387 of the Civil Procedure Code, the Court, acting as a court of cassation, could quash a decision of a lower court if it established that there had been serious violations of substantive or procedural norms and that the failure to remedy such violations had excluded the restoration of the rights and lawful interests of the applicant. Such an appeal was therefore an extraordinary remedy. The national courts had relied on the position of the Constitutional Court, which had previously found that legal restrictions on women's employment were constitutional and therefore not discriminatory. The State party had argued that the substantive law had been applied correctly in the author's case, thus failing to explain the basis for a potential appeal in cassation to the Supreme Court. At the same time, there had been no procedural violations in the author's case that could have been remedied by the Supreme Court. Accordingly, such an appeal in cassation to the Supreme Court was moot and not an effective remedy available to her.

7.2 The author also submitted that it was evident from the wording of article 4 of the Convention that it had been included for the purpose of requiring States to enable women to achieve de facto or substantive equality with men, bearing in mind that sometimes non-identical treatment of women and men was required owing to their biological differences.[4] Thus, article 4 (2) was intended to encompass positive and potentially preferential actions favouring women (referred to as "special measures") to effectively enable women's equal enjoyment of their rights, including to work, by taking account of biological differences and pregnancy and maternity needs, for example through laws that provided for paid maternity leave. The provision did not sanction the restriction of women's rights, including to work, on the basis of biological differences or their potential to become pregnant and bear children. The author noted in addition that the State party had presented no information with regard to the failure of the authorities to adopt positive measures to enable the author to take the desired post.

State party's further observations

8. On 13 November 2014, the State party referred to the content of articles 320, 330 (1), 376, 387, 391.1 and 391.9 of the Civil Procedure Code. The State party also referred to the definition of "discrimination against women" under article 1 of the Convention and reiterated that the adoption of special measures directed at protecting motherhood was not considered discriminatory. It reiterated its submission regarding the findings of the Constitutional Court in decision

[4] The author refers to the Committee's general recommendation No. 25 (2004) on temporary special measures.

No. 617-O-O of 22 March 2012 (see para. 4.2) and some of its previous submission (see para. 6.1).

Author's additional comments

9. On 14 January 2015, the author submitted that the State party's observation contained no new arguments, that she had no further comments and that she fully supported her initial communication.

Issues and proceedings before the Committee

Consideration of admissibility

10.1 In accordance with rule 64 of its rules of procedure, the Committee must decide whether the communication is admissible under the Optional Protocol. Pursuant to rule 72 (4), it is to do so before considering the merits of the communication.

10.2 The Committee notes that, in its observations dated 23 October 2013, the State party challenged the admissibility of the communication, apparently based on insufficient substantiation of the author's claims, without specifying a particular ground under the Optional Protocol. The Committee takes note of the State party's submissions of 26 February 2014 and 14 November 2014 that the author could have filed an appeal in cassation against the judgement of the Samara District Court of 20 August 2012 and the decision of the Samara Region Court of 19 November 2012 before the Supreme Court and that she had the possibility of requesting a supervisory review of the decision dismissing her appeal in cassation to the Presidium of the Samara Region Court (of 7 March 2013) before the Judicial Board on Civil Cases of the Supreme Court and that, accordingly, the communication should be declared inadmissible.

10.3 The Committee recalls that, under article 4 (1) of the Optional Protocol, it is precluded from considering a communication if it has ascertained that all available domestic remedies have not been exhausted, unless the application of such remedies is unreasonably prolonged or unlikely to bring effective relief. In that connection, the Committee also takes note of the author's explanation that an appeal in cassation to the Supreme Court is not an effective remedy for her because the court of cassation can quash a decision of a lower court only if it establishes serious violations of substantive or procedural norms, yet, in her case, the State party has argued that the substantive law was applied correctly and there were no procedural violations that could have been remedied by the Supreme Court.

10.4 The Committee observes that, pursuant to article 376 of the Civil Procedure Code, the grounds for cancellation or alteration of judicial decisions in the cassation procedure are major violations of the rules of material law or of the rules of procedural law that have affected the outcome of the case. The Committee also observes that the cassation review appears to be primarily one of the legality of the decisions of the lower courts. At the same time, the Committee notes that the author is not challenging the legality of those decisions, but the compatibility of the respective provisions of the Labour Code and Regulation No. 162 of 25 February 2000 with the provisions of articles 1, 2 (c), (d), (e) and (f) and 11 (1) (b), (c) and (f) of the Convention. The Committee therefore considers that a further appeal in cassation would not constitute an effective remedy for the alleged violations in the case of the author.

10.5 The Committee notes that one of the grounds for revocation of decisions in the supervisory review procedure under article 391.9 of the Civil Procedure Code is a violation of the human rights and freedoms guaranteed by the Constitution, the universally recognized principles and rules of international law and international treaties made by the State party. The Committee, however, observes that the issue of the constitutionality of the challenged legislation has already been reviewed by the highest instance in the State party, namely the Constitutional Court (see paras 2.4, 2.10, 2.13, 4 2 and 6.1), that the Constitutional Court has found that the provisions in question do not contradict the Constitution and that the lower courts have based their decisions to a great extent on that position of the Constitutional Court. The Committee observes that the State party has not explained whether the suggested request for a supervisory review to the Supreme Court would result in an assessment of whether the author had been subjected to discrimination in employment based on her sex. In the light of the information available to it, the Committee considers that it is not precluded from reviewing the communication by article 4 (1) of the Convention.

10.6 Having found no impediment to the admissibility of the author's claims, the Committee proceeds to their consideration on the merits.

Consideration of the merits

11.1 The Committee has considered the present communication in the light of all the information made available to it by the author and by the State party, as provided in article 7 (1) of the Optional Protocol.

11.2 The Committee notes the author's claim that her rights under articles 1, 2 (c), (d), (e) and (f) and 11 (1) (b), (c) and (f) of the Convention have been violated because, first, although she had initially been selected for the position of helmsperson-motorist, she was ultimately denied employment on account of a prohibition established in article 253 of the Labour Code and Regulation No. 162, on the basis of her sex and, second, because the State party had failed to oblige the employer to take reasonable measures to make the working environment suitable for women. The Committee also notes that the State party does not deny that the author was subjected to differential treatment on account of her sex, but that the above treatment was prescribed by national law and that it constituted part of special measures to protect women in certain types of work, for reasons inherent in their physical nature, namely their ability to become mothers, and therefore it should not be considered discriminatory. The State party also indicates that the refusal by an employer to recruit a woman to perform the kind of work listed is not discriminatory if the employer has not established a safe working environment for the particular job and the safety situation is confirmed by a special assessment of the working conditions.

11.3 The Committee recalls that articles 2 (d) and (f) establish obligations upon States parties to abolish or amend discriminatory laws and regulations, to abstain from engaging in any act or practice of direct or indirect discrimination against women and to ensure that any laws that have the effect or result of generating discrimination are abolished.[5] The Committee observes that provisions regarding the protection of persons working under hazardous or difficult conditions should be aimed at protecting the health and safety of both men and women at work, while taking account of gender differences with regard to specific risks to their health. The

[5] See general recommendation No. 28, paras. 31 and 35.

Committee further observes that article 253 of the Labour Code and Regulation No. 162 of 25 February 2000 exclude women from being employed in 456 occupations and 38 branches of industry and that no evidence has been provided to the Committee that the inclusion of the position of helmsperson-motorist in the list of prohibited jobs is based on any scientific evidence that it may be harmful to women's reproductive health. The Committee notes that the State party makes reference to the high level of noise, but provides no evidence that that is harmful to women's reproductive health. The Committee is of the view that the introduction of such legislation reflects persistent stereotypes concerning the roles and responsibilities of women and men in the family and in society that have the effect of perpetuating traditional roles for women as mothers and wives and undermining women's social status and their educational and career prospects. The Committee also recalls that, in its concluding observations on the State party's eighth periodic report, it expressed concern about the overprotective list of occupations and branches in which women were precluded from access to the labour market and recommended that the State party should review the list to ensure that it covered only restrictions necessary for the protection of maternity in the strict sense and should promote and facilitate women's entry into previously listed jobs by improving working conditions and adopting appropriate temporary special measures (CEDAW/C/RUS/CO/8, paras. 33-34). The Committee concludes that the above legislative provisions violate the State party's obligations under articles 2 (d) and (f) of the Convention.

11.4 The Committee further recalls that, according to article 2 (c), States parties must ensure that courts are bound to apply the principle of equality as embodied in the Convention and to interpret the law, to the maximum extent possible, in line with the obligations of State parties under the Convention.[6] The Committee also recalls that article 2 (e) establishes an obligation of States parties to eliminate discrimination by any public or private actor and requires them to establish legal protection of the rights of women on an equal basis with men, ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination and take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise.[7] The Committee observes that in the present case the State party's courts assessed the refusal to employ the author as a helmsperson-motorist as lawful, without assessing her claims that the refusal discriminated against her on the basis of her sex, and found no obligation under the law for the employer to create employment conditions that would be safe for women. The Committee therefore finds that the State party's courts accordingly condoned the discriminatory actions of the private company. In the circumstances, the Committee considers that the State party violated its obligations under articles 2 (c) and (e), read in conjunction with article 1, of the Convention, by not ensuring a practical realization of the principle of equal treatment provided for by the Convention and the Constitution and not ensuring the effective protection of women against any act of gender-based discrimination.[8]

11.5 With regard to the author's claim of a violation by the State party of her rights under articles 11 (1) (b) and (c), the Committee notes her arguments that the refusal to employ her as a helmsperson-motorist and the confirmation of that decision by the courts demonstrated that she was de facto prohibited from exercising her right to

[6] See ibid., para. 33.

[7] See ibid., para. 36.

[8] See communication No. 28/2010, *R.K.B. v. Turkey*, views adopted on 24 February 2012, para. 8.6.

employment in accordance with her education because her qualification as a navigation officer would in any case automatically entail work in conditions deemed hazardous for women by the State party. The Committee notes that the State party has not specifically contested the above assertion. The Committee notes that the denial of employment puts the author in a position that she cannot earn a living through the profession for which she was educated and therefore results in adverse economic consequences for her. The Committee is therefore of the view that the existing legislation does not ensure, on a basis of equality for women and men, the right to the same employment opportunities, including the application of the same criteria for selection in matters of employment. The Committee also observes that under the existing legislative framework the author will be unable to have the same employment opportunities for the positions for which she has educational qualifications unless employers decide to create safe working conditions; however, it is entirely within the discretion of the employers to take on the extra burden to create such safe working conditions for women and to obtain the necessary certification. In the light of the foregoing, the Committee considers that the refusal to employ the author on the basis of a blanket legislative provision constituted a violation of her rights to have the same employment opportunities and to freely choose her profession and employment under articles 11 (1) (b) and (c) of the Convention, meaning that the author has suffered a violation of her rights under those provisions, which the State party's courts have failed to address.

11.6 With regard to the author's claim of a violation by the State party of her rights under article 11 (1) (f), the Committee notes the State's party's argument that the list of industries, professions and jobs with unhealthy and/or dangerous work conditions with restricted female labour was approved through a procedure established by the Government, taking into account the opinion of the Russian Trilateral Committee on Social and Labour Relations. It also notes the State party's assertion that the psychophysiological characteristics of workers are taken into consideration when establishing particular limitations on the use of women's labour and that such limitations are introduced in relation to the need for them to be specially protected from harmful production factors that have a negative influence on the female body, in particular on its reproductive function. In establishing a list of arduous jobs and jobs with harmful or dangerous working conditions forbidden to women, the State party claims to have acted on the basis of an assessment of the working conditions, the level of influence of those conditions on the body of the working woman and its reproductive function. The Committee further takes note of the State party's submission that section 404 (1) of the list establishes that women can be employed in the listed positions if the employer creates safe working conditions.

11.7 The Committee observes that article 11 (1) (f) of the Convention should be read together with articles 2 and 3. Under those provisions the State party is required to provide equal protective measures to safeguard the reproductive functions of both men and women and to create safe working conditions in all industries, rather than preventing women from being employed in certain areas and leaving the creation of safe working conditions to the discretion of employers. When a State party wishes to deviate from the above approach, it must have strong medical and social evidence of the need for protection of maternity/pregnancy or other gender-specific factors. The Committee observes that the adoption of a list of 456 occupations and 38 branches of industry contradicts the State party's obligations under the Convention because it treats men and women differently, it in no way promotes the employment of women and it is based on discriminatory stereotypes. Furthermore, an employment procedure in which individual employers have the discretion to deviate from the list and employ women if safety can be

guaranteed is not in compliance with the requirements of the Convention because there are no obligations for the employer either to create safe working conditions or to employ women even if they are the best-qualified applicants. The Committee further observes that the existing extensive list may influence the recruitment choices made by employers. The Committee therefore considers that article 253 of the Labour Code and Regulation No. 162 of 25 February 2000, as applied in the case of the author, are not in accordance with the State party's obligations under article 11 (1) (f) of the Convention. The Committee considers that the refusal to employ the author on the basis of the above-mentioned legislative provisions constituted a violation of her rights to have her health and safety in working conditions ensured on equal basis with men under article 11 (1) (f) of the Convention.

12. In accordance with article 7 (3) of the Optional Protocol and taking into account all the foregoing considerations, the Committee considers that the State party has violated the rights of the author under articles 2 (c), (d), (e) and (f) and 11 (1) (b), (c) and (f) of the Convention.

13. The Committee makes the following recommendations to the State party:

(a) With regard to the author of the communication: grant the author appropriate reparation and adequate compensation commensurate with the seriousness of the infringement of her rights and facilitate her access to jobs for which she is qualified;

(b) In general:

(i) Review and amend article 253 of the Labour Code and periodically revise and amend the list of restricted occupations and sectors established under Regulation No. 162 in order to ensure that restrictions applying to women are strictly limited to those aimed at protecting maternity in the strict sense and those providing special conditions for pregnant women and breastfeeding mothers and do not hinder the access of women to employment and their remuneration on the basis of gender stereotypes;

(ii) After the reduction of the list of restricted or prohibited occupations, promote and facilitate the entry of women into previously restricted or prohibited jobs by improving working conditions and adopting appropriate temporary special measures to encourage such recruitment.

14. In accordance with article 7 (4) of the Optional Protocol, the State party shall give due consideration to the views of the Committee, together with its recommendations, and submit to the Committee, within six months, a written response, including information on any action taken in the light of those views and recommendations. The State party is also requested to publish the Committee's views and recommendations and to have them widely disseminated in order to reach all relevant sectors of society.